84-1727 (1)

No.

Office-Supreme Court, U.S.
FILED
MAY 1 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

SUSAN E. JOHNSON,
PETITIONER,

v.

EDUCATIONAL TESTING SERVICE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JACK R. PIROZZOLO *
MARY JEANNE TUFANO
WILLCOX, PIROZZOLO & MCCARTHY
PROFESSIONAL CORPORATION
50 Federal Street
Boston, Massachusetts 02110
(617) 482-5470

* Attorney of Record

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

43P

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

I

Questions Presented

1. Whether Educational Testing Service is entitled to a ruling as a matter of law that its actions are in good faith when the validity of its LSAT test to a black female candidate and its procedures in invalidating test scores are called into issue by the candidate?

2. Whether Educational Testing Service is entitled to a ruling as a matter of law, when the score received by a black female candidate on its LSAT exam increased from 317 and 323 to 623, that the 317 and 323 scores were true and accurate indicators of the candidate's ability so as to permit it to draw the inference that the 623 score was the result of impersonation?

3. Whether Educational Testing Service, as the primary selector of lawyers and having state involvement at every level of its structure, is subject to the provisions of 42 U.S.C. § 1983 with respect to its test procedures and procedures regarding invalidation of test scores as they pertain to the LSAT exam?

4. Whether a black female candidate for the LSAT exam given by ETS may be deprived of her right to trial by jury when she raises the issue of ETS's good faith in administering and properly scoring the LSAT exam and its good faith in proceeding to invalidate her score where she submitted facts to support a finding that such invalidation proceedings were pretextual and that the intent was to maintain the illusion that the LSAT is a reliable predictor of law school performance?

5. Whether a litigant may be denied the right of access to the court, where a motion for summary judgment which had been briefed ten years earlier was still pending, by an order prohibiting the filing of anything other than a twenty page memorandum?

6. Whether a candidate who has sworn under oath that she took the alleged questioned LSAT exam should be deprived of an opportunity to have a jury of her peers judge her credibility over that of Educational Testing Service?

7. Whether the court as a matter of law may rule that the Educational Testing Service program is a good faith predictor of success in law school?

8. Whether a candidate should be deprived of presenting to a jury of her peers the fact that she graduated from the University of California Law School at Berkeley, "Boalt Hall", a fact that is more consistent with a score in the range of 600 on the LSAT test than with a score of 300 which ETS maintains she scored? (The fact that the candidate's graduation from Boalt Hall is not in the record is because she was not given an opportunity to make further filings. However, both the Trial Court and the Court of Appeals were advised orally that she had graduated from law school at the University of California at Berkeley.)

9. Whether a plaintiff was entitled to present to a jury of her peers the fact, among others, that her graduating from the University of California at Berkeley was inconsistent with the scores of 317 and 323 and therefore ETS's administration of the examination and subsequent action to invalidate her scores were not in good faith?

TABLE OF CONTENTS

	Page
Questions Presented	1
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions and Rules Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. This Case Presents Questions of Great Public Importance	7
II. The Decision of the First Circuit To Affirm the District Court's Termination of Petitioner's Action Through Summary Judgment Is in Conflict With Decisions of This Court	9
A. The First Circuit's Decision to Affirm Summary Judgment on Petitioner's State Law Claims Is in Conflict With Decisions of This Court	9
B. The First Circuit's Decision To Affirm Summary Judgment on Petitioner's Constitutional Claim Is in Conflict With Decisions of This Court and Other Circuits	11
Conclusion	14
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1

Table of Authorities

Cases

	Page
Anderson v. *City of Bessemer City*, 53 U.S.L.W. 4314 (March 19, 1985)	12
Blum v. *Yaretsky*, 457 U.S. 991 (1982)	13
Board of Education, Island Trees Union Free School District v. *Pico*, 457 U.S. 853 (1982)	9
Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961)	12
Foman v. *Davis*, 371 U.S. 178 (1962)	8
Gilmore v. *Salt Lake Community Action Program*, 710 F.2d 632 (10th Cir. 1983)	12, 13
Lugar v. *Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982)	12
McVarish v. *Mid-Nebraska Community Mental Health Center*, 696 F.2d 69 (8th Cir. 1982)	13
Milonas v. *Williams*, 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983)	13
Poller v. *Columbia Broadcasting System*, 368 U.S. 464 (1962)	9, 11
Rendell-Baker v. *Kohn*, 457 U.S. 830 (1982)	13

Constitutional and Statutory Provisions

U.S. Constitution, Amendment XIV	12
U.S. Constitution, Amendment VII	11
42 U.S.C.A. § 1983 (1981)	12

Rules

Federal Rules of Civil Procedure,	
Rule 15(a)	8
Rule 56	9

In the
Supreme Court of the United States

OCTOBER TERM, 1984

No. _____

SUSAN E. JOHNSON,
PETITIONER,

v.

EDUCATIONAL TESTING SERVICE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Susan E. Johnson, your petitioner, prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in the case of *Susan E. Johnson* v. *Educational Testing Service*, No. 84-1597.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit, dated January 31, 1985, not yet reported, is set forth in Appendix A. The unreported Judgment and Memorandum of Decision of the United States District Court for

the District of Massachusetts, dated June 8, 1984, is set forth in Appendix B. The judgment entered by the United States Court of Appeals for the First Circuit on January 31, 1985 is set forth in Appendix C.

Jurisdiction

The judgment which petitioner seeks to have reviewed was entered by the United States Court of Appeals for the First Circuit on January 31, 1985. Petitioner invokes the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions and Rules Involved

UNITED STATES CONSTITUTION
AMENDMENT XIV, SECTION 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

AMENDMENT VII

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

42 U.S.C.A. § 1983 (1981)

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

RULE 56(C), FEDERAL RULES OF CIVIL PROCEDURE

"The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Statement of the Case

This petition arises out of the decision of the United States Court of Appeals for the First Circuit to affirm the decision of the United States District Court for the District of Massachusetts to terminate petitioner's case against Educational Testing Service by entering summary judgment against her.

Petitioner, Susan Johnson, commenced a diversity action against respondent, Educational Testing Service ("ETS") in June of 1972. Petitioner alleged that ETS, in its administration, scoring and reporting of her Law School Admission Test ("LSAT"), acted in breach of its warranty that the LSAT was a reliable indicator of performance in law school, and that ETS, in its summary, arbitrary and improper invalidation of her LSAT score, acted in breach of its contractual obligations, violated her rights of due process under the Fourteenth Amendment and committed various torts against her.

The following facts were before the courts below:

Respondent ETS, a non-profit corporation created by the American Council on Education, the College Entrance Examination Board and the Carnegie Foundation for the Advancement of Teaching, administers the LSAT, a requirement for admission to most law schools. (App. B at B-3); Defendant's Answer to Complaint, ¶ 4.) At the time at issue in this case, ETS stated in its Bulletin of Information concerning LSAT scores: "They are a dependable measure of certain mental abilities found to be important in the study of law." (ETS, LSAT Bulletin of Information 1970-1971 at 18.) However, publications which are part of the record in this case have called into question the ability of Educational Testing Service to meet its warranties and have criticized ETS for the cultural and racial bias inherent in its standardized tests. *E.g.*, Robertson, *Examining the Examiners: The Trend Toward Truth in Testing*, 9 J.L. Educ. 167 (1980).

ETS also stated in its *Bulletin of Information:*

> If doubts are raised about a candidate's scores after they have been reported, ETS will investigate the circumstances of the testing. Educational Testing Service reserves the right to cancel any test score, if in the opinion of ETS there is adequate reason to question its validity. Before exercising this right, ETS will offer the candidate a retest at no additional fee.

(ETS, LSAT 1970-1971 Bulletin of Information at 17.) Documents which are part of the record in this case show that ETS officials routinely would call into question a score difference of 300 points over a previous score. (*E.g.*, October 15, 1971 Letter from Robert E. Smith of ETS to Robert E. Sullivan, petitioner's then attorney at 4.)

Petitioner, a black female, registered for and took the LSAT on three occasions. On the first two occasions of her taking the LSAT, in October and December 1970, despite her fine academic record as a student at Radcliffe College, Ms. Johnson received scores of 317 and 323, respectively. (App. B at B-2.)

Ms. Johnson registered for and took the LSAT on a third occasion, in April 1971. At that time, she had been tutored in preparation for taking the LSAT over a period of ten weeks and was under medication to reduce her anxiety. (App. A at A-3.) In early May of 1971, ETS reported Ms. Johnson's April test score as 623 to several law schools, including the University of California at Berkeley. The University of California at Berkeley accepted Ms. Johnson for its fall class soon thereafter. (App. B at B-2.)

ETS then invalidated Ms. Johnson's 623 LSAT score. By letter dated June 10, 1971, ETS informed Ms. Johnson that "serious doubts" had been raised concerning the validity of her April score and gave her the alternatives of (1) retaking an LSAT, (2) cancelling it, (3) submitting further information, or (4) doing nothing. (App. B at B-7 - B-8.)

Ms. Johnson chose to prove that she had taken the April LSAT. Ms. Johnson's counsel forwarded to ETS various documents to prove that she had taken the April test, including an affidavit by Ms. Johnson affirming that she had taken the April test and describing in detail the circumstances surrounding her taking of the test, an affidavit of plaintiff's tutor, and letters by various educators attesting to Ms. Johnson's high academic ability and qualities of personal

integrity. (App. B at B-8.) In addition, Ms. Johnson submitted a detailed opinion by an independent handwriting specialist whom she retained which stated that Ms. Johnson's October, December and April LSAT papers and other writing samples were written by the same person (App. B at B-9.) During the series of communications between petitioner and respondent ETS had obtained three handwriting opinions which concluded that a different person had written the April 1971 test papers. (App. B at B-7 – B-9.)

Ms. Johnson's efforts to prove she took the questioned LSAT were met with a continuous pattern of resistance from ETS officials. ETS officials told Ms. Johnson that they suspected her of impersonation and told her "we know what you did and you know what you did so you just better take that retest." (Transcript of deposition of Susan E. Johnson, Jan. 24, 1973 at 196.) Later, ETS officials told petitioner's counsel that they would not be swayed by "pressure from the prestigious Harvard professors," and that the affidavit submitted by Ms. Johnson was "self-serving" and would be accorded no weight as evidence in her favor. (Affidavit of Kent J. Neumeister, dated February 25, 1974 at 3-4.) ETS refused to provide the names of proctors at the April test site or of students sitting near Ms. Johnson who would still have been able to identify her. (*Id.* at 6) ETS took the position that even if Ms. Johnson were identified by an eyewitness, this would not prove that she "was not guilty of some wrongdoing." (*Id.*)

ETS invalidated Ms. Johnson's 623 LSAT score on September 3, 1971 and immediately informed all of the law schools concerned, including the University of California at Berkeley ("Berkeley"). Berkeley revoked Ms. Johnson's acceptance to its law school by letter that same day. (App. B at B-2.) At the request of Ms. Johnson, and following review of the handwriting opinions obtained by ETS, however, the Dean of the Berkeley Law School commissioned a fifth handwriting analyst in California to review her handwriting, including

all of the test samples, the submitted documents, and her signature given to him in his presence. Only after this analyst stated that all of the documents were written by the same person, did Berkeley admit Ms. Johnson unconditionally to its school (App. A at A-3.)

Despite petitioner's contentions and the facts she submitted in support of her contentions, summary judgment was granted to ETS, nearly twelve years after Ms. Johnson commenced her action and more than ten years after ETS filed its motion for summary judgment (App. B.) Just prior to the district court's grant of summary judgment to ETS, the parties were allowed to submit only supplemental memoranda of no more than twenty pages in order to reflect developments in the law since 1974 when the motion was originally briefed (App. A at A-4.) At that time, Ms. Johnson moved for leave to file a motion to amend her complaint to reflect developments in the law in the twelve years since she filed her complaint which were applicable to her fact situation. The district court denied Ms. Johnson's motion when it granted ETS's motion for summary judgment (App. A at A-4.) The district court's denial of Ms. Johnson's motion for leave to file a motion to amend her complaint and its entry of summary judgment in favor of ETS was affirmed by the court of appeals (App. A.)

Reason for Granting the Writ

I. This Case Presents Questions of Great Public Importance

At the heart of this case is the control exercised by the Educational Testing Service over access to law schools through standardized tests which have been found to be culturally and racially biased. Petitioner suffered damage from ETS's failure to reliably predict, through the LSAT, her performance in law school and from its invalidation of her one LSAT score which was consistent with her academic performance and the more likely predictor of her success. The termination of her case

through summary judgment by the courts below denied petitioner the opportunity to have a jury of her peers examine the motives and intentions of ETS and determine whether, in fact, petitioner was a victim of an ETS policy to protect its image as a reliable predictor of performance and selector of persons to be allowed access to law schools such that ETS acted in breach of its warranty and contractual obligations, denied her due process and committed torts against her.

The failure to properly adjudicate petitioner's claim, as set forth, *infra*, is not only a wrong to petitioner but also a wrong to all others who have been denied access to law schools and the legal profession as a result of ETS's actions in furthering its image as a reliable predictor of performance.

Moreover, the district court's delay of nearly ten years in ruling on ETS's motion for summary judgment, coupled with its refusal to consider Ms. Johnson's motion for leave to amend her complaint to reflect developments in the law, effectively denied petitioner access to the courts. This Court has made clear that the mandate of Rule 15(a), Fed. R. Civ. P., that leave to amend "shall be freely given when justice so requires" is to be heeded. *E.g.*, *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). The passage of time since Ms. Johnson initiated this case is no fault of Ms. Johnson and she should not be penalized for it. The district court's denial of access to Ms. Johnson by its delay and refusal to consider amended claims to reflect developments in the law which took place during the delay, sanctioned by the court of appeals, is that type of departure from the accepted and usual course of judicial proceedings which calls for the exercise of this Court's power of supervision.

II. The Decision of the First Circuit To Affirm the District Court's Termination of Petitioner's Action Through Summary Judgment Is in Conflict With Decisions of This Court.

A. *The First Circuit's Decision To Affirm Summary Judgment on Petitioner's State Law Claims Is in Conflict With Decisions of This Court.*

Petitioner claimed before the district court and the court of appeals that summary judgment was inappropriate because there existed genuine issues of fact material to her claims that ETS acted in breach of its warranties and contractual obligations and committed torts against her. As this Court has made clear, Rule 56 of the Federal Rules of Civil Procedure:

> [a]uthorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is,. . .[and where] no genuine issue remains for trial. . .[for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944).

Poller v. *Columbia Broadcasting System*, 368 U.S. 464, 467 (1962).

On a motion for summary judgment, decisions of this Court required that the district court and the court of appeals view the record in the light most favorable to Ms. Johnson, the party opposing the motion. *E.g.*, *Board of Education, Island Trees Union Free School District* v. *Pico*, 457 U.S. 853 (1982); *Poller*, 368 U.S. at 473. For each of Ms. Johnson's breach of warranty, breach of contract, defamation, and intentional interference with contractual relations claims, the court would have been precluded from granting summary judgment had it properly construed the record.

When reviewing for purposes of summary judgment Ms. Johnson's claim that ETS acted in breach of its warranty that the LSAT was a reliable predictor of performance in law school, the court, had it properly drawn all inferences favorable to Ms. Johnson, would have accepted that she took all three tests, that her ability was in the 623 score range, that there is a cultural and racial bias to ETS tests, and that ETS had an interest in maintaining its image as a reliable predictor of law school performance. Ms. Johnson had submitted sufficient facts to require the court to so draw these inferences, including affidavits concerning her taking of the October test and dealings with ETS, her academic record, statements from her teachers and publications in the record concerning the racial and cultural bias of ETS's standardized tests.

Similarly, the court was required to accept the above statements as true when ruling on Ms. Johnson's claim that ETS was in breach of its contract to administer a reliable test correctly predicting her performance in law school, to investigate the circumstances of her testing if questions were raised concerning her score and to cancel her score only where there was adequate reason to question its validity. Furthermore, based on the affidavits and other statements submitted by Ms. Johnson, the court was required, in drawing all inferences favorable to Ms. Johnson, to accept that ETS did not investigate the circumstances of her testing but instead held stubbornly to the view that the score differential was the reason for invalidating her score. The court clearly did not draw all inferences favorable to Ms. Johnson, either on her claims for breach of warranty and contract or on her claims for defamation and intentional interference with contractual relations, summary judgment on which required a finding that ETS did not act in bad faith.

The refusal by the district court and the court of appeals to draw all inferences in favor of the petitioner on a motion for summary judgment is in conflict with the rulings of this Court.

E.g. Poller, 368 U.S. at 473. Furthermore, the concern which this Court has expressed regarding the use of summary judgment in actions where the motives and intentions of the parties are at issue applies in this case as well:

> We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even-handed justice.'

Poller, 368 U.S. at 473. Whatever evidence was presented by ETS concerning its own actions in dealing with Ms. Johnson was simply insufficient to foreclose the possibility, supported by facts, that ETS acted in bad faith. "Even-handed justice" as defined by this Court requires that a jury decide the issue. In effect, petitioner was denied her right to a trial by jury guaranteed by the Seventh Amendment to the United States Constitution. The affirmance by the First Circuit of the district court's egregious departure from the proper standard for summary judgment mandates the exercise of this Court's supervision.

B. *The First Circuit's Decision To Affirm Summary Judgment On Petitioner's Constitutional Claim Is In Conflict With Decisions Of This Court And Other Circuits*

As it did with petitioner's state law claims, the court of appeals acted contrary to decisions of this Court in affirming

the district court's grant of summary judgment on petitioner's due process claim on the ground that the state action necessary to make ETS subject to the requirements of due process and liable under 42 U.S.C. §1983 was lacking. ETS failed to submit sufficient evidence to establish the absence of an issue of fact as to the influence of state officials on the questioned ETS policies and as to the role of the LSAT as the primary vehicle for the selection of law students and lawyers. Had the court properly construed all inferences in favor of Ms. Johnson, as a jury would be entitled to do, *see Anderson* v. *City of Bessemer City*, 53 U.S.L.W. 4314 (March 19, 1985)(findings of fact, including those based in inferences from other facts may not be set aside unless clearly erroneous), decisions of this Court would have precluded summary judgment on Ms. Johnson's constitutional claim.

In the past, this Court has looked to the indicia of state involvement to determine whether state action is present under certain circumstances. *See e.g.*, *Lugar* v. *Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982), *citing Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) ("'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.'") Petitioner submitted evidence to show that ETS exercised a veto power over acceptance decisions of state law schools, including that the University of California at Berkeley revoked its acceptance of petitioner to its law school immediately upon ETS's cancellation of her LSAT score, *and* that there was state involvement at every level of ETS's structure, including public officials serving on its Board of Trustees.

The decision of the First Circuit to foreclose petitioner from asking a jury to draw an inference of state control over ETS from, among other things, the public officials on ETS's governing board conflicts with decisions of other Circuits. Other Circuit Courts of Appeals have implicated the state in private

action where public officials served on governing boards. *See, e.g., Gilmore* v. *Salt Lake Community Action Program*, 710 F.2d 632, 637-638 (10th Cir. 1983)(court found private, non-profit corporation could be fairly considered a state actor, where one third of the members of its governing board were public officials); *McVarish* v. *Mid-Nebraska Community Mental Health Center*, 696 F.2d 69, 71 (8th Cir. 1982)(court found state action where 12 of the 17 members of the Center's governing board were governmental officials or their appointees.)

Furthermore, in *Gilmore*, the Tenth Circuit made clear the significance of public officials on an organization's Board, regardless of their number: "The potential for government influence cannot be directly calibrated to the number of officials on the board; the officials, by virtue of the requirement of their presence and the power of their positions, can exercise influence far in excess of their proportional representation." 710 F.2d at 638, n.12. Petitioner contends and submitted facts supporting that founding organizations of ETS ensured that the interests of their members, many public institutions, would dictate the policies and actions of ETS through their control of the Board of Trustees. *See also, Milonas* v. *Williams*, 691 F.2d 931, 940 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983)(state had so insinuated itself with private school as to be considered a joint participant in offending actions, where plaintiffs had been involuntarily placed in school by state officials who were aware of and approved of offending practices).

Given the inference which a jury could reasonably draw concerning state control over ETS based on the indicia of state involvement enumerated by petitioner, the First Circuit erred in relying on this Court's recent decisions of *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982) and *Blum* v. *Yaretsky*, 457 U.S. 991 (1982) as precluding the existence of state action in this case. In both *Blum* and *Rendell-Baker*, the relationship between the

private party and the state was in some critical aspect less than that of ETS and the state in this case. A fact finder's reasonable conclusion that the state did exert control over ETS would certainly preclude a finding as a matter of law that no state action exists so as to require ETS to comply with the due process requirements of the Fourteenth Amendment. The conflict of the First Circuit's decision with the decisions of this Court and other Circuits calls for further appellate review by this Court.

Conclusion

For the foregoing reasons, it is in the public interest that this Court grant the application of Susan Johnson for further appellate review.

Respectfully submitted,

JACK R. PIROZZOLO
MARY JEANNE TUFANO
WILLCOX, PIROZZOLO & MCCARTHY
PROFESSIONAL CORPORATION
50 Federal Street
Boston, Massachusetts 02110
(617) 482-5470

United States Court of Appeals
For the First Circuit

No. 84-1597

SUSAN E. JOHNSON,
PLAINTIFF, APPELLANT,

v.

EDUCATIONAL TESTING SERVICE,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. RYA W. ZOBEL, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
BOWNES, *Circuit Judge*, and
MALETZ,* *Senior Judge*.

Jack R. Pirozzolo with whom *Mary Jeanne Tufano* and *Willcox, Pirozzolo & McCarthy* were on brief for appellant.

George C. Caner, Jr. with whom *Wayne H. Scott* and *Ropes & Gray* were on brief for appellee.

January 31, 1985

MALETZ, *Senior Judge*. Plaintiff-appellant Susan Johnson appeals from the district court's entry of summary judgment in favor of defendant-appellee Educational Testing Service, Inc. (ETS) and the court's denial of leave to amend her complaint. We affirm.

* Of the United States Court of International Trade, sitting by designation.

I. *Background*

ETS is a non-profit corporation that prepares and administers the Law School Admission Test (LSAT). Susan Johnson, who was then a college senior, took the LSAT three times and achieved the following scores, on a scale of 200 to 800:

October 1970.....317
December 1970....323
April 1971.....623

After ETS reported the 623 score to various law schools, the School of Law of the University of California at Berkeley (Berkeley) accepted Johnson for its fall class. On May 11, 1971, the University of Pennsylvania Law School, which had accepted Ms. Johnson in March, telephoned ETS to question the validity of the 623 score. ETS's Test Security Office then commenced an investigation, which included submission of the answer sheets and registration forms for all three tests to Jan Beck, a handwriting expert. Mr. Beck concluded that the April 1971 answer sheets and registration form were not written by the same person who wrote the first two answer sheets.

After reviewing the documents and Beck's opinion, ETS's Board of Review concluded that there was serious doubt about the validity of the 623 score and that Johnson should be so advised. Accordingly, on June 10, 1971, Louis Fowler, Secretary of the Board of Review and a member of the Test Security Office, wrote to Johnson advising her of the Board's doubts and offering her the following alternatives: (1) retaking the LSAT at no charge; (2) cancelling the 623 score; (3) submitting further information; or (4) doing nothing. Fowler said that ETS would cancel the 623 score if Johnson did nothing, or requested cancellation, or took the examination again but failed to "confirm" the score.

During the following weeks, ETS received further queries about the discrepancies in Johnson's LSAT scores from Berkeley and Columbia Law School. Ultimately, ETS con-

sulted with two other handwriting experts, Ordway Hilton and Paul Osborn, who agreed with Beck's earlier conclusion that the April 1971 examination was not written by the same person who took the first two examinations. For her part, Johnson submitted her own affidavit and affidavits and letters by others to substantiate her claim that she was a person of good character; that she had taken all three examinations; and that the improvement in her score was made possible by, among other things, her receiving tutoring for the LSAT and taking medication to reduce anxiety.

ETS officials met with Johnson and her then attorney on August 5, 1971, and advised that ETS would require a retest to confirm her highest score. ETS proposed to give Johnson the same test that resulted in the 623 score and represented that the score would be confirmed if she came within fifty—or, depending on the circumstances, up to one hundred—points of 623. Johnson declined to take a retest on the ground that ETS could not duplicate her April 1971 "state of non-anxiousness." Later, Johnson presented a report by another handwriting expert, Elizabeth McCarthy, who concluded that Johnson had written all the answer sheets.

On September 3, 1971, ETS's Board of Review decided to cancel the 623 score. Berkeley responded by revoking its acceptance of Johnson, but later admitted her on a provisional basis. On October 11, 1971, Berkeley informed ETS that in reliance on the opinion of yet another handwriting expert, Sherwood Morrill—who concluded that all three examinations were written by the same person—it would admit Johnson unconditionally.

Johnson commenced this diversity action in June 1972 and asserted five claims; one federal constitutional claim and four state law claims. She alleged that ETS: (1) arbitrarily invalidated the 623 score, thus denying her due process; (2) breached certain warranties; (3) breached its contract with her; (4) "wrongfully interfered with the advantageous con-

tractual relationship" she had with Berkeley; and (5) defamed her. In January 1974, ETS moved for dismissal and summary judgment on all five counts of the complaint. In February 1974, Johnson filed opposition papers. The district court stayed discovery and, in May 1975, ordered the parties to submit statements of the material facts that, they contended, were or were not at issue. The parties filed such statements within the next several weeks. Thereafter, a period of almost nine years elapsed, during which the district court failed to rule on the pending motions.

Finally, in 1984, the action was reassigned to another district judge, who permitted each party to submit a supplemental memorandum of no more than twenty pages to reflect developments in the law since 1974. On June 8, 1984, the court, in an unpublished memorandum of decision, entered summary judgment for ETS on all counts and denied Johnson's "motion for leave to file a motion to amend the complaint." This appeal followed.

II. *The Due Process Claim*

To succeed on her first claim, alleging a deprivation of due process, Johnson must show that ETS is a state actor and that its conduct was state action. This is because the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948). *Accord, e.g.*, *Blum* v. *Yaretsky*, 457 U.S. 991, 1002 (1982). In other words, the Fourteenth Amendment "applies to acts of the states, not to acts of private persons or entities." *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 837 (1982). Therefore, in reviewing constitutional claims, the Supreme Court has "insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

The state action inquiry is two-fold: (1) whether "the deprivation [was] caused by the exercise of some right or

privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," *id.*, and (2) whether "the party charged with the deprivation [was] a person who may fairly be said to be a state actor." *Id.* Since the test has two components, "not all actions by state actors are state action." *Gilmore* v. *Salt Lake Community Action Program*, 710 F.2d 632, 638 (10th Cir. 1983). *See Lugar*, 457 U.S. at 935-36 n.18 (discussing *Polk County* v. *Dodson*, 454 U.S. 312 (1981)).

Johnson contends that ETS is a state actor because the LSAT, which it administers, is a prerequisite to admission to nearly all law schools, many of which, including Berkeley, are state schools. Therefore, she argues, ETS exercises a virtual veto power over admission to law schools. She also points to ETS's contract with the Law School Admission Council, which provides that the Council (1) has ultimate responsibility for carrying out testing programs used for admission to law school and for the content of the tests and (2) determines general policy concerning conduct of the program in consultation with ETS. Johnson further notes that approximately 45% of the Council's members, including Berkeley, are state schools. Moreover, she alleges that the ETS Board of Trustees included public officials and representatives of bodies that included public institutions.

Although Johnson's conception of state action was arguably tenable when her complaint was filed, the recent decisions in *Blum* and *Rendell-Baker* are fatal to her theory. *Cf. Cohen* v. *President of Harvard College*, 729 F.2d 59, 60 (1st Cir.) (per curiam) (commenting on devitalization of argument that Harvard, by accepting federal funds, became liable for violations of First and Fifth Amendments), *cert. denied*, __ U.S. __, 105 S. Ct. 233 (1984).

In *Blum*, the Court held that private nursing homes did not engage in state action when they discharged or transferred Medicaid patients, even though the state subsidized the

operating and capital costs of the facilities, paid medical expenses of more than 90% of the patients, and licensed the facilities. 457 U.S. at 1011. The Court reasoned:

> That the State responds to such [private discharge and transfer] actions by adjusting benefits does not render it *responsible* for those actions. The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care.

Id. at 1005 (emphasis in original).

Similarly, in *Rendell-Baker*, the Court declined to find state action in the decision by a private school to discharge certain employees, notwithstanding that "virtually all of the school's income was derived from government funding." 457 U.S. at 840. The Court held that the significant presence of public funds was insufficient to comprise state action:

> The school, like the nursing homes [in *Blum*], is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

Id. at 840-41. *Accord Polk County* v. *Dodson*, 454 U.S. 312, 318-19 (1981) (although state paid public defender, her relationship with her client was identical to that between any lawyer and client).

The principles of *Blum* and *Rendell-Baker* have been applied to the National Collegiate Athletic Association (NCAA), which "is a voluntary, unincorporated association of nearly one thousand four-year colleges and universities. Approxi-

mately one-half of its members are public institutions, state and federal." *Arlosoroff* v. *NCAA*, 746 F.2d 1019, 1020 (4th Cir. 1984). Distinguishing earlier cases that had held the NCAA to be a state actor, the Fourth Circuit observed:

> These earlier cases rested upon the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action. That notion has now been rejected by the Supreme Court, however, and its decisions require a different conclusion.

Id. at 1021 (citing *Rendell-Baker* and *Blum*).

If anything, ETS is less a state actor than the NCAA. Whereas the NCAA is capable of disqualifying an athlete from intercollegiate competition, *id.* at 1020, ETS merely reports test scores and lacks authority to decide who shall be admitted and who shall be rejected. What is more, just as the regulation of college athletics is "not a function 'traditionally exclusively reserved to the state,' " *id.* at 1021 (quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)), the formulation, grading, and reporting of standardized tests is not an exclusive public function. *See Rendell-Baker*, 457 U.S. at 842 (education of maladjusted high school students, although a public function, is not exclusive prerogative of the state, even where private entity provides such education at public expense).

In *Arlosoroff*, there was no suggestion that public institutions belonging to the NCAA, as opposed to private institutions that were members, "caused or procured the adoption of the [disputed] Bylaw." 746 F.2d at 1021. Here, too, Johnson has not offered any proof that public institutions belonging to ETS took the lead in instigating the conduct she challenges.[1]

[1] *Cf. Rivas Tenorio* v. *Liga Atletica Interuniversitaria*, 554 F.2d 492, 495-96 (1st Cir. 1977) (Commonwealth action found where Puerto Rican athletic association was dominated by Commonwealth instrumentalities and Commonwealth relinquished portion of governmental power to association).

In short, Johnson's due process claim cannot withstand the tests of *Blum* and *Rendell-Baker* and the district court correctly entered summary judgment for ETS on the claim.[2]

III. *State Law Claims*

The last four of Johnson's claims are predicated on state contract and tort law. Although "the court must indulge all inferences favorable to the party opposing" a motion for summary judgment, *Hahn* v. *Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976), and must "look at the record . . . in the light most favorable to . . . the party opposing the motion," *Poller* v. *Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962), "[t]he purpose of summary judgment is to go behind the pleadings and determine whether any further exploration of the facts is really necessary." *Packish* v. *McMurtrie*, 697 F.2d 23, 27 (1st Cir. 1983).

It is not enough for Johnson to rely on the allegations of her complaint, *id.*, in the absence of issues of fact that are "both 'genuine' and 'material.' " *Hahn*, 523 F.2d at 464. The principle was summarized in *Hahn*:

> A material issue is one which affects the outcome of the litigation. To be considered "genuine" for Rule 56 purposes a material issue must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank of Arizona* v. *Cities Service Co., Inc.*, 391 U.S. 253, 289, 88 S.Ct.

---

[2] This is not to say that ETS can never be a state actor engaging in state action. *Cf. Martin* v. *Educational Testing Serv.*, 179 N.J. Super. 317, 324 n.7, 431 A.2d 868, 871 n.7 (Ch. Div. 1981) (ETS concededly acted as agent of Commonwealth of Pennsylvania in administration of real estate license examination); *Golden Rule Life Ins. Co.* v. *Mathias*, 86 Ill. App. 3d 323, 408 N.E.2d 310 (4th Dist. 1980) (dismissal of complaint inappropriate where plaintiffs alleged that ETS designed examinations for licensure of insurance agents and brokers, graded examinations, determined who passed, and printed state licenses).

1575, 1592, 20 L.Ed.2d 569 (1968). The evidence manifesting the dispute must be "substantial", *Fireman's Mut. Ins. Co.* v. *Aponaug Mfg. Co., Inc.*, 149 F.2d 359, 362 (5th Cir. 1945), going beyond the allegations of the complaint. *Beal* v. *Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972). *Id.* Given these considerations, we find that the record discloses no genuine issues of material fact on Johnson's contract and tort claims and hence that those claims are resolvable by way of summary judgment.

A. *Claims for Breach of Warranty and Breach of Contract*

Johnson alleges that ETS breached its warranties to her, because the LSAT was not what it purported to be—an accurate indicator of law school performance that could not be skewed by training or preparation. However, rather than alleging damage from the variation in her scores, Johnson asserted instead that her 623 score was cancelled in bad faith. This is the essence of her breach of contract claim. Therefore, the district court correctly concluded that her breach of warranty claim stated no claim independent of her breach of contract claim.

Johnson's breach of contract claim must be viewed against the background of the information bulletin distributed by ETS to all LSAT candidates, which stated in part:

> If doubts are raised about a candidate's scores after they have been reported, ETS will investigate the circumstances of the testing. Educational Testing Service reserves the right to cancel any test score, if in the opinion of ETS there is adequate reason to question its validity. Before exercising this right, ETS will offer the candidate a retest at no additional fee.

Accepting Johnson's contention that Massachusetts law—which the parties agree applies to the breach of contract claim—requires ETS to exercise its contractual rights reasonably and in good faith, *see Salem Glass Co.* v. *Joseph*

Rugo, Inc., 343 Mass. 103, 176 N.E.2d 30 (1961), summary judgment is still appropriate. As this court observed in a similar context, a plaintiff cannot force a trial by pointing to smoke but not fire, and "[h]ere we do not even see any smoke." *Packish*, 697 F.2d at 27.

It is not necessary to recount all the indicia of ETS's reasonableness and good faith. We think it sufficient to note that ETS sought the services of three separate handwriting experts after the University of Pennsylvania questioned the 300-point discrepancy in Johnson's scores; that ETS provided Johnson with an opportunity to be heard and to be represented by counsel; and that ETS offered Johnson, without charge, the option of a retest in which she would take the same April 1971 examination that resulted in the 623 score. These and other factors indicate that ETS went beyond the letter of its contractual promise. While Johnson "is entitled to all favorable inferences, [s]he is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture." *Manganaro* v. *Delaval Separator Co.*, 309 F.2d 389, 393 (1st Cir. 1962).

B. *Interference With Contractual Relationship Claim*

The parties disagree over the choice of law on Johnson's claim that ETS intentionally interfered with her contractual rights by notifying Berkeley that the 623 score was invalidated. Johnson concedes, however, that the claim requires proof that ETS acted intentionally and without justification. *See Imperial Ice Co.* v. *Rossier*, 18 Cal. 2d 33, 112 P.2d 631 (1941); *Bledsoe* v. *Watson*, 30 Cal. App. 3d Supp. 105, 106 Cal. Rptr. 197 (1973). In light of our holding that summary judgment was appropriate on the breach of contract claim, there can be no doubt that ETS was entitled to summary judgment on the intentional interference claim, too. Since ETS acted in good faith, its actions can hardly be characterized as "without justification."

C. *Defamation Claim*

For similar reasons, the district court was correct in granting ETS summary judgment on Johnson's defamation claim, which alleged damages by reason of "various oral and written communications [informing] persons and institutions, including the California School of Law [Berkeley], that the plaintiff's LSAT score of April 17, 1971 was invalid. . ." This being a diversity action, we must apply the substantive law of the states—California, Massachusetts, New York, and Pennsylvania—in which the allegedly defamatory material was published. *See Harkaway* v. *Boston Herald Traveler Corp.*, 418 F.2d 56, 58 (1st Cir. 1969).

In the absence of bad faith, each of these states grants a qualified privilege to communications between those having a common interest in the substance of the communications, such as those between ETS and the law schools to which the scores were reported. *See Bollow* v. *Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1102 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Williams* v. *Taylor*, 129 Cal. App. 3d Supp. 745, 181 Cal. Rptr. 423 (1982); Cal. Civ. Code § 47(3) (West 1982); *Sheehan* v. *Tobin*, 326 Mass. 185, 93 N.E.2d 524 (1950); *Buckley* v. *Litman*, 57 N.Y.2d 516, 443 N.E.2d 469, 457 N.Y.S.2d 221 (1982); *Toker* v. *Pollack*, 44 N.Y.2d 211, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978); *Baird* v. *Dun & Bradstreet*, 446 Pa. 266, 285 A.2d 166 (1971); *Beckman* v. *Dunn*, 276 Pa. Super. 527, 419 A.2d 583 (1980).

Here, as the district court pointed out, cancellation of the 623 score was not undertaken in bad faith. Therefore, ETS's communications to the law schools noticing the cancellation were protected by the qualified privilege. And other communications, since they were directed by ETS to Johnson and her agents, were not actionable. *See Burns* v. *Barry*, 353 Mass. 115, 228 N.E.2d 728 (1967). In these circumstances, summary judgment on the defamation claim was appropriate.

D. *Intentional Infliction of Emotional Distress Claim*

The district court rejected Johnson's assertion, first made in 1984, that her complaint implicitly stated a claim for intentional infliction of emotional distress. To justify her delay in asserting the claim, Johnson points out that the Supreme Judicial Court of Massachusetts did not approve a claim for intentional infliction of emotional distress, in the absence of resulting bodily injury, until 1976, long after this action began. *See Agis* v. *Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976). But the possibility that such a claim would be approved was expressly acknowledged before this action was commenced, in *George* v. *Jordan Marsh Co.*, 359 Mass. 244, 255, 268 N.E.2d 915, 921 (1971), where the court approved a claim for intentional infliction of emotional distress when bodily injury was present.

Johnson's unwillingness to take a path left open by *George* or, for more than seven years, to seek leave to amend her complaint in light of *Agis*, provide ample justification for the district court's finding that the complaint did not state a claim for intentional infliction of emotional distress. Moreover, against the background of our holding that ETS did not act in bad faith, the claim would have lacked merit even if seasonably and explicitly asserted. *See Agis*, 371 Mass. at 145, 355 N.E.2d at 319 (to succeed on claim for intentional infliction of emotional distress, plaintiff must show defendant's conduct to be "extreme and outrageous," "beyond all possible bounds of decency," and "utterly intolerable in a civilized community").

IV. *Leave To Amend the Complaint*

Johnson's final argument is that the district court erred in denying leave to amend the complaint so that she might advance claims based on contemporary legal precedents. Although leave to amend a pleading "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a), the district

court has discretion to deny leave to amend in the face of "extraordinarily long and essentially unexplained delay." *Carter* v. *Supermarkets Gen. Corp.*, 684 F.2d 187, 192 (1st Cir. 1982). *Cf. Chitimacha Tribe of Louisiana* v. *Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982) ("Mere passage of time need not result in denial of leave to amend, but delay becomes fatal at some period of time."), *cert. denied*, __ U.S. __, 104 S. Ct. 69 (1983).

Although ETS's motion for summary judgment was left pending by the district court for a long period of time, and discovery was suspended, Johnson was always free to move for leave to amend her complaint. The district court acted reasonably in denying leave to amend the complaint after more than a dozen years had passed. Nor, despite Johnson's contention to the contrary, did the court abuse its discretion when, in 1984, it limited the parties to memoranda of twenty pages in supplementation of their 1974 memoranda on the motion for summary judgment.

V. *Conclusion*

We have fully considered appellant's other arguments and find them to be without merit. The judgment of the district court is affirmed.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 72-1837-Z

SUSAN E. JOHNSON

v.

EDUCATIONAL TESTING SERVICE, INC.

JUDGMENT

ZOBEL, D.J.

In accordance with the Memorandum of Decision, dated June 8, 1984, it is

ORDERED, that judgment be and it hereby is entered for defendant.

(s) RYA W. ZOBEL
District Judge

June 8, 1984
Date

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 72-1837-Z

SUSAN E. JOHNSON

v.

EDUCATIONAL TESTING SERVICE, INC.

MEMORANDUM OF DECISION

ZOBEL, D.J.

Defendant Educational Testing Service, Inc. ("ETS") is a non-profit corporation which prepares and administers various educational tests, including the Law School Admission Test ("LSAT"). Plaintiff Susan Johnson, then a college senior, took the LSAT in October and December 1970 and received score reports of 317 and 323, respectively. After the April 17, 1971 LSAT test date, ETS reported a score of 623 for Johnson, an unusual increase. She was soon thereafter offered admission to the University of California Law School at Berkeley ("Berkeley"), which she accepted. In June 1971, however, ETS notified plaintiff that it had serious doubts concerning the validity of the score reported for her on the April 17 LSAT. After a series of communications between the parties and actions by both, discussed below, ETS on September 3, 1971 cancelled the score. It also orally informed Berkeley of the cancellation and sent written notice to Berkeley and other law schools to which plaintiff had requested her scores be reported. Berkeley by letter that same day informed plaintiff that its offer of admission had been withdrawn.[1]

---

[1] By September 21, 1971 Berkeley provisionally admitted plaintiff to classes; she was fully reinstated by October 11, 1971.

Plaintiff brought this diversity action against ETS alleging that its invalidation of the score was arbitrary, depriving her of her right to due process under the Fifth and Fourteenth Amendments to the United States Constitution; that ETS breached certain warranties it made to plaintiff concerning the LSAT; that its actions in reaching the determination to invalidate the April score breached its contract with plaintiff; that it interfered with the advantageous contractual relationship between plaintiff and Berkeley; and that it defamed plaintiff. ETS has moved for summary judgment on all five counts of the complaint.

The following facts relating to plaintiff's due process claim are undisputed.[2] ETS is a non-profit corporation created by the American Council on Education ("ACE"), the College Entrance Examination Board ("CEEB") and the Carnegie Foundation for the Advancement of Teaching, to carry on educational testing activities.[3] In 1971 it was managed by a 16-member Board of Trustees. The Presidents of ACE and CEEB were trustees ex officio; and other trustees were chosen by the Board from candidates nominated by ACE, CEEB, and the Board itself. Two of the trustees were officers of state universities.

---

[2] Contrary to plaintiff's assertion, there remains no genuine issue of fact material to resolution of her claim under Count I; the question of law presented can be resolved accepting plaintiff's statement of facts.

[3] According to material submitted by plaintiff, the ACE is a council of approximately 200 educational associations and 1500 institutions of higher education, (with some 60 affiliated institutions), founded as a center of cooperation for the improvement of education. It is governed by a 29-member Board of Directors. The CEEB is a non-profit corporation comprised of educational institutions and organizations, with the purpose of assisting in and coordinating activities connected with the transition of students from secondary schools to colleges, such as admissions procedures and testing. It is governed by a 25-member Board of Trustees. Some members of both ACE and CEEB are publicly supported institutions and officials of state educational institutions have served on the Boards of ACE and of CEEB.

ETS designs and administers the LSAT under an agreement with the Law School Admission Council ("LSAC"),[4] which determines the general policy concerning conduct of the LSAT program. Under the agreement, ETS receives its costs plus a fee, equal to 13% of the costs.

Plaintiff contends first that state schools' membership in ACE, CEEB and LSAC, together with the fee payments allowed under LSAC's contract with ETS, amount to state control of ETS or such state involvement that ETS actions must be deemed those of the state; and second, that ETS exercised a public function in that state law schools delegated to ETS in its administration of the LSAT "virtual veto power" over what candidates would be selected for admission.

The latter argument can be readily dismissed. Plaintiff does not suggest that administration of standardized tests for law school admission is a function " 'traditionally the exclusive prerogative of the state,' " *Blum* v. *Yaretsky*, 457 U.S. 991, 1005 (1982) (quoting *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)), as it must be to support a finding of state action. *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982). Nor has she adduced any facts to contradict defendant's evidence that law schools make their own independent admissions decisions.[5]

---

[4] The Law School Admission Council is a non-profit corporation composed of approximately 141 law schools; 63 members are state-supported. Its functions are analogous to those of the CEEB in that it provides services to law schools relating to admissions, and has ultimate responsibility for carrying on testing programs used for admission to law schools. By agreement with ETS, the council has delegated responsibility for design and administration of the LSAT to ETS.

[5] The situation is thus clearly different from that in the cases upon which plaintiff relies. *Martin* v. *Educational Testing Service, Inc.*, 179 N.J. Super. 317, 431 A.2d 858 (N.J. Super. 1981) and *Golden Rule Life Insurance Co.* v. *Mathias*, 86 Ill. App. 3d 323, 408 N.E.2d 310 (1980), involved examinations administered by ETS for state licensing authorities which were the sole requirement for and the sole method of obtaining a real estate and insurance broker's license, respectively, for practice in the state. (In *Martin* ETS agreed

Plaintiff's funding argument likewise fails in light of *Rendell-Baker* v. *Kohn*. There, the Supreme Court concluded that near-total government funding of a school did not constitute a sufficient nexus to make the school's personnel actions those of the funding state. *Id.* at 840. The amount of public funds, if any, coming to ETS from state members of LSAC is far less than the support held insufficient to constitute government action in *Rendell-Baker*.

Plaintiff has made no showing of any direct state regulation of ETS testing activities, including the decision to invalidate a score. She would, however, hold the state responsible for defendant's invalidation of the score by finding a substantial degree of public participation in ETS's action and entanglement between the state and ETS which amounts to a symbiotic relationship, *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). She relies upon *Rivas Tenorio* v. *Liga Atletica Interuniversitaria*, 554 F.2d 492 (1st Cir. 1977), where the First Circuit held the action of an association of seven Puerto Rican colleges, including four state-supported ones, to be state action. The continuing validity of *Rivas Tenorio* is questionable in the light of *Blum* and *Rendell-Baker*, as the First Circuit has recognized, *Spath* v. *National Collegiate Athletic Association*, 728 F.2d 25, 28 (1st Cir. 1984). Even if *Rivas Tenorio* remains good law, however, most of the factors the court there found to indicate a state nexus are lacking here. While ETS does provide a valuable service to members of the LSAC, less than one-half of those members are public institutions; there is no indication that public institutions provide the "vast majority" of ETS's capital

---

that it was acting as the agent of the state, and in *Golden Rule* the state licensing commission worked closely with ETS in developing the test, having final review power over the form and content of the questions.) Here, ETS's role more closely resembles that in *Stewart* v. *Hannon*, 469 F. Supp. 1142, 1147 (N.D. Ill. 1979), where satisfactory performance in the ETS-administered test was only one requirement of several for those seeking to be high school principals, an oral examination and experience being necessary as well. The court there held that ETS was not engaged in state action.

or that state instrumentalities are a dominant force in determining its policy and dictating its actions. Indeed, the undisputed facts concerning its funding and governance are to the contrary. ETS is controlled not by member schools but by a self-perpetuating Board of Trustees, only some of whose members are nominated by organizations partially composed of state universities. Such a tenuous connection is far from the symbiosis required to make ETS actions attributable to the state.

As a matter of law, therefore, I find that ETS action was not "state action" under the Fourteenth Amendment.[6] Because its actions were not subject to the requirements of the due process clause, defendant is entitled to summary judgment on Count I of the complaint.

There remain plaintiff's further claims that defendant's actions violated state contract and tort law.

Count II of the complaint alleges that plaintiff was induced to contract with ETS to take the LSAT by certain express and implied warranties made by ETS concerning the nature and purpose of the test, that ETS breached its warranties causing plaintiff to receive varying scores, and then concealed its breach by invalidating her high score. Plaintiff alleges no damage from the variation of scores in itself, and Count II thus amounts to an assertion that the cancellation was done in bad faith. As such, it states no claim independent of that in Count III, and I consider it in conjunction with Count III.

In Count III plaintiff alleges that defendant breached its contractual obligation to her to report her scores, to investigate the circumstances of the testing if doubts were raised about her score, to cancel the score only if there was adequate reason to question its validity, and to make that determination in good faith. The terms of the contract are contained in the 1970-71 LSAT Bulletin of Information. The relevant portion

---

[6] Other courts have reached the same conclusion. *See Brown* v. *Educational Testing Service*, No. C-71-2029-AJZ (N.D. Cal. Jan. 31, 1972), *K.D.* v. *Educational Testing Service*, 87 Misc. 2d 657, 386 N.Y.S. 2d 747 (1976).

provides: "If doubts are raised about a candidate's scores after they have been reported, ETS will investigate the circumstances of the testing. Educational Testing Service reserves the right to cancel any test score, if in the opinion of ETS there is adequate reason to question its validity. Before exercising this right, ETS will offer the candidate a retest at no additional fee." Accepting plaintiff's contention that Massachusetts law[7] requires such a unilateral decision by a party to a contract to be reasonable,[8] and her contention that defendant had an obligation to make its decision in good faith, the facts appearing from the parties' submissions, even viewed most favorably to plaintiff, here compel the conclusion that ETS's conduct complied with both requirements and in no way constituted a breach of its contract with plaintiff.

The validity of the April score was originally questioned by the Admissions Office of the University of Pennsylvania in a call to ETS on May 11, 1971. After that call, three members of the ETS Test Security Office ("TSO") individually reviewed the answer sheet and registration form for that administration and those in October and December and concluded that the April forms were not written by the person who wrote the October and December forms. The documents were sent to Jan Beck, a handwriting expert, who reached the same conclusion.

The ETS Board of Review was an internal ETS committee with responsibility for reviewing information on questioned test scores and deciding what action should be taken. On June 8, Susan Johnson's case was presented to the Board as one of several instances of suspected irregularities. Based on the documents from the TSO and the opinion of Beck, the Board concluded that serious doubt existed about the validity of plaintiff's April score and sent a letter to plaintiff so informing her. The letter, signed by Louis Fowler as Secretary of the

---

[7] The parties agree that Massachusetts law governs the contract claim.

[8] *See Salem Glass Co.* v. *Joseph Rugo*, 343 Mass. 103, 176 N.E.2d 30 (1961).

Board of Review, stated that before taking any further steps, the Board would appreciate receiving from her any additional information she wished to provide. It offered plaintiff the further options of taking a free retest under special supervision, or requesting that the score be cancelled, noting that it would give recipients of the cancellation notice no reason for the cancellation.

By July 1, plaintiff had retained counsel and requested that ETS consider additional information. During the same period, Columbia and Berkeley had called ETS to request information about the April score. At its meeting of July 13, 1971, the Board had before it letters from two Harvard faculty members, the President and the Dean of Connecticut College, supporting plaintiff's ability and integrity, as well as a letter from the Associate Dean of Radcliffe College speaking highly of plaintiff's integrity and noting her recommendation that plaintiff take a retest. The Board decided to consult a second handwriting expert, Ordway Hilton.

At a further meeting on July 22, 1971, the Board had, besides the materials above, a six-page letter from plaintiff's counsel setting forth plaintiff's view of the facts, supporting materials, and requests for information from ETS; plaintiff's college transcript; medical records concerning her stress-related problem; plaintiff's affidavit describing the circumstances of the April test; the affidavit of Kay Sternfeld, who described tutoring plaintiff in the techniques of standardized test-taking; and handwriting samples provided by plaintiff. A TSO member reported that Hilton had in a telephone call stated his conclusion that a different person had written the April test from the one who had written the two earlier tests. The Board deferred action until receipt of a written report to that effect from Hilton.

On August 5, plaintiff and her attorney met with John Kramer, general counsel to ETS, Fowler, and Thomas Robinson, Associate Program Director of the LSAT Program. Plain-

tiff refused to take a retest and it was agreed that she would retain a handwriting expert, Elizabeth McCarthy. At the end of August, McCarthy orally informed Fowler of her conclusion that plaintiff had written all of the documents in question. ETS decided to seek the opinion of a fourth expert and sent the documents to Paul Osborn.

On September 3, the Board met again about plaintiff's case. During the meeting Fowler spoke to Osborn and reported that Osborn believed the April test had been written by a different person. The Board voted unanimously to cancel the score, called Berkeley to inform it of the cancellation, and sent a written notice of cancellation to the other schools plaintiff had designated as recipients of score reports.

The Board of Review's decision to cancel the score thus was made after a lengthy process, including four meetings of the Board. The Board had requested (in its letter of June 11, 1971) and accepted extensive documentation submitted on behalf of plaintiff. It considered plaintiff's submissions, as well as those of its own Test Security Office personnel, the scores themselves, and the opinions of four handwriting experts, three unfavorable to plaintiff. Its conclusion that there was adequate reason to question the validity of plaintiff's score was a reasonable one, reached with deliberation in good faith.[9] ETS's cancellation of the April score was in accordance

[9] Plaintiff's claim that additional discovery is needed on the issue of bad faith is without merit. In contrast to the situation in *Parrish* v. *Board of Commissioners of the Alabama State Bar*, 533 F.2d 942 (5th Cir. 1976) on which she relies, defendant here has not simply denied misconduct. The record here contains not only the affidavits of the Board members asserting their reasons for reaching the decision, but also the documents before the Board at each stage of the proceedings. Regardless of whether the result was right or wrong, the record makes clear that the decision had good faith grounds. *See Swencki* v. *Educational Testing Service*, No. C81-0689 L(A) (W.D. Ky. May 26, 1983); *K.D.* v. *Educational Testing Service*, 87 Misc. 2d 656, 386 N.Y.S.2d 747 (1976). Plaintiff has offered nothing to controvert defendant's position. Given this lack of any factual dispute, summary judgment is appropriate on the issue of good faith. *See Packish* v. *McMurtrie*, 697 F.2d 23 (1st Cir. 1983).

with the terms of its unambiguous contract with plaintiff, and it is therefore entitled to summary judgment on Count III of the complaint.

There remain plaintiff's two tort counts. In one she alleges that ETS defamed her by informing "through various oral and written communications persons and institutions" that the April score was invalid. In the other she alleges an interference with her contractual relationship with Berkeley. The parties agree that ETS notified Berkeley, the only recipient specified in the complaint, both orally and in writing of the invalidation.[10] Identical notices were sent to the other institutions to which plaintiff had requested that her scores be reported.

Even accepting plaintiff's contention that the notice of cancellation was defamatory, carrying the innuendo that it was caused by dishonest conduct on plaintiff's part, the undisputed facts support defendant's claim that the communication was privileged. ETS's interest in ensuring the validity of the scores it reports is undisputed; the law schools involved had an interest in receiving accurate score information as part of their admissions process. Under the law of all the states in question,[11] communications between those having such a com-

[10] The notice was as follows:

"NOTICE OF CANCELLATION OF TEST SCORES

This is an official notice from Educational Testing Service that the scores for the candidate and the administration as indicated have been cancelled and are no longer retained in our records.

Susan E. Johnson
D22 Adam[sic] House Harvard
Cambridge, Massachusetts

April 1971 LSAT

In our considered opinion, these scores should not be used as a basis for judgments concerning the candidate."

[11] In this diversity action Massachusetts choice of law rules determine the applicable substantive law, which under those rules would be that of each place of publication. *Harkaway* v. *Boston Herald-Traveler Corp.*, 418 F.2d 56 (1st Cir. 1969); *Brewster* v. *Boston Herald-Traveler Corp.*, 188 F. Supp. 565 (D. Mass. 1960). *See also Pevoski* v. *Pevoski*, 371 Mass. 358, 358 N.E.2d 416 (1976); *Restatement (Second) of Conflict of Laws* § 149 (1971). The institutions in question are located in California, Massachusetts, New York and Pennsylvania.

United States Court of Appeals
For the First Circuit

No. 84-1597

SUSAN E. JOHNSON,
PLAINTIFF, APPELLANT,

v.

EDUCATIONAL TESTING SERVICE,
DEFENDANT, APPELLEE.

JUDGMENT
Entered: January 31, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
FRANCIS F. SCIGLIANO, *Clerk.*

By (s) (ILLEGIBLE)
Chief Deputy Clerk.

[cc: Messrs. Pirozzolo and Caner]